No. 17-1351

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

INTERNATIONAL REGUGE ASSISTANCE PROJECTS, *ET AL*

Plaintiffs-Appellees,

v.

PRESIDENT DONALD J. TRUMP, *ET AL*

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

RAISING POLITICAL QUESTION NONJUSTICIABILITY, *AMICUS CURIAE* BRIEF FROM PROFESSOR VICTOR WILLIAMS, OF THE AMERICA FIRST LAWYERS ASSOCATION, IN SUPPORT OF PRESIDENT DONALD J. TRUMP, *ET AL* AND IMMEDIATE DISMISSAL OF THE LOWER COURT ACTION

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U.S. Court of Appeals
Fourth Circuit

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CERTIFICATE AS TO PARTIES & RELATED CASES

A. Parties and Amici. All parties, interveners, and amici appearing in this Court are listed in party briefing except that this brief is filed on behalf of Professor Victor Williams in support of Defendants.

B. Related Cases. Other related cases of which *Amicus* is aware are referenced in the briefing offered by parties.

Dated: March 30, 2017

/s/Victor Williams

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CERTIFICATE OF AUTHORSHIP, FORMAT COMPLIANCE, AND FINANCIAL CONTRIBUTION

This brief is offered by *Amicus* as an individual. Institutional affiliation is offered only for informational purposes. It is presented in 14 point, New Times Roman font totaling 6428 words. No party's counsel authored this brief in whole or in part, and no party, nor other person, contributed money intended to fund the preparation or submission of this brief.

Dated: March 30, 2017

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STATEMENT OF IDENTITY, INTEREST AND AUTHORITY OF *AMICUS*

Appealing to the Court's broad discretion to allow this *amicus* filing, in a separate Motion to which both Plaintiffs and Defendants consent, *Amicus* avers his significant interest in this case and suggests that the proffered brief will be of unique assistance to the Court. Professor Victor Williams is a Washington, D.C. attorney and law professor with over twenty years' experience -- formerly affiliated as fulltime faculty with both the Catholic University of America's Columbus School of Law and the City University of New York's John Jay College of Criminal Justice. Professor Williams has particular knowledge and expertise regarding the text, history, and interpretation of Article II and Article III of the U.S. Constitution with many scholarly and popular publications. He earned his J.D. from the University of California-Hastings College of the Law. After completing an externship with both Ninth Circuit Judge Joseph Sneed and Eleventh Circuit Judge Gerald Bard Tjoflat and a two-year clerkship with Judge Brevard Hand of the Southern District of Alabama, Williams did advanced training in federal jurisdiction and international law (LL.M.) from Columbia University's School of Law and in economic analysis of the law (LL.M.) from George Mason University's Scalia School of Law.

In past, Professor Victor Williams has been granted leave to file *amicus* briefs in other lower courts as well as by the U.S. Supreme Court. Professor Williams has published scholarship and commentary that offered strong support for the constitutional discretion and prerogatives of the past four presidents (without regard to their party affiliation). Professor Williams zealously advocated for timely Senate confirmation of the judicial and executive nominees of both George W. Bush and Barack Obama. Although these past presidents often pursued policy ends at odds with Professor Williams' personal policy preferences, he continued to defend their constitutional authority.

But now, Professor Williams' acknowledges that his ultimate policy preference to always "put America first" is clearly reflected in President Trump's agenda and early actions. Williams was an early primary supporter of candidate Donald Trump. In spring 2016, Williams launched a widely-reported legal action, after obtaining "competitor candidate standing" as a write-in candidate in several late primary states, to challenge the ballot eligibility of (naturally-born Canadian) Ted Cruz. (www.victorwilliamsforpresident.com). *See e.g., Debra Weiss, Law Prof a Write-In GOP Candidate to Challenge Ted Cruz Eligibility*, ABA JOURNAL, April 11, 2016, http://www.abajournal.com/news/article/law_prof_enters_gop_presidential_race_to_challenge_ted_cruzs_eligibility/ and Pete Williams, *Law Professor Challenges*

Cruz on Citizenship, Candidacy, NBC NEWS, April 11, 2016, http://www.nbcnews.com/news/us-news/law-professor-candidate-challenges-cruz-citizenship-n554046.

After Senator Cruz withdrew from the GOP primary, Professor Williams also withdrew from the primary race, formerly endorsed Donald Trump, and founded Super PAC (GOP Lawyers) rallying Lawyers and Law Professors (www.goplawyers.com) to support Donald Trump in the general election. *See* Victor Williams, *Trump Will Bring Return to Rule of Law and Economic Growth*, THE HILL, Nov. 6, 2016. http://thehill.com/blogs/pundits-blog/presidential-campaign/304291-trump-will-bring-return-to-rule-of-law-and-economic , Victor Williams, *Law Professor Now Proudly in Basket of Deplorables,* THE HILL, Sept. 20, 2016, http://thehill.com/blogs/pundits-blog/presidential-campaign/296783-law-prof-once-an-obama-supporter-now-in-basket-of , and *Inside the Beltway: 'Lawyers for Trump' Founded"* WASH. TIMES, July 4, 2016.

The campaign group has now transformed into the "America First Lawyers Association" (www.americafirstlawyers.com) which Professor Williams chairs, to advance the Trump administration's "America first" nominations, policies, and programs. *See e.g.* Victor Williams, *D.C. Law Professor Makes Case for Sessions' Senate Confirmation,* STREET INSIDER, Jan. 9, 2017, http://markets.financialcontent.com/streetinsider/news/read/33555004

Amicus submits that the proffered brief will make a valuable contribution to the existing briefing in this case as it presents a targeted theory asserting that the claims against the president's travel freeze raise a nonjusticiable political question – thus this Court does not have subject matter jurisdiction.

Submitted on March 30, 2017

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ARGUMENT

Amicus fully supports Defendants' standing, ripeness, consular nonjusticiability, and statutory arguments. *Amicus* notes that Defendants' compelling statute-based arguments have been recently successful in a lower court's ruling in this very Circuit. *Sarcour v. Donald J. Trump* (17-cv-120, E.D. Va, 3/24/17). *Amicus* offers a brief specifically targeted to support a political-question nonjusticiable ruling that will better insure finality and prevent future frivolously-natured litigation challenging the foreign-policy authority of our newly-elected president.

This brief expresses concern that our judiciary is being drawn into the densest and most ugly of modern "political thickets." D.C. Circuit Judge Stephen Williams has long-ago taught that "finality" is one the political question doctrine's great virtues: "Although the primary reason for invoking the political question doctrine in our case is the textual commitment…the need for finality also demands it." *Nixon v. United States,* 938 F.2d 239, 245-46 (D.C. Cir. 1991) (citations omitted).

Amicus first acknowledges, however, the emotionally-compelling narratives regarding the aliens at issue in the instant action and in related cases filed throughout the nation. The aliens seeking entry onto American soil come from nations beset with evil oppression, state-sponsored terrorism, violent domestic disorder, and religious civil wars. Adequate reasons are presented to explain the aliens' desired entry; often involving being reunited with loved ones. Yet, these aliens seek entry into America as our nation continues to be in a prolonged war with radical terrorists, many of whom have come from those very same nations. In 2016, then-Sen. Jeff Sessions' Senate Judiciary Subcommittee reported that 40 terrorists from the six listed nations, are among 380 foreign-born terrorists, who have been *charged, tried, and convicted* of terrorist acts in the United States. Our new president instituted the travel freeze both to better prosecute this war on terror and to fundamentally shift American foreign policy. Although no salve for those who suffer, William Tecumseh Sherman's missive applies: "I am sick and tired of war. Its glory is all moonshine....War is hell." Nan Levinson, WAR IS NOT A GAME: THE NEW ANTIWAR SOLDIERS AND THE MOVEMENT THEY CREATED 13 (Rutgers 2014).

Just as did Barack Obama for eight years, our new president is engaging in a delicate national security and foreign policy calculus as he begins to prosecute the unprecedented, prolonged war with terrorists from these six nations and other nations of the region. Stephen Dinan, *Trump Says Extreme Vetting Pause Is Same as Obama's 2011 Iraq Policy*, WASH. TIMES, Jan. 29, 2017, http://www.washingtontimes.com/news/2017/jan/29/trump-says-extreme-vetting-pause-same-obamas-2011-/.

As a matter of first-order determination, this Court is barred from making an inquiry into the Executive Branch's calculus. Assertion that such an inquiry is necessary for the Court to conduct a second-order analysis of immigration statutes, Administrative Procedure Act (APA) immigration processes, or specious constitutional claims does not make that inquiry or the controversy justiciable. Assertion of specious claims from American citizens, businesses, or sovereign States, that they suffer tangent harm from the implementation of the travel freeze, or equally specious claims of broad due process, equal protection, and religious discrimination violations arising from the travel freeze, do not make this controversy justiciable.

In various factual contexts, the Supreme Court has repeatedly ruled: "[A]n alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative." *Landon v. Plasencia*, 459 U.S. 21, 32 (1982). In implementing the travel freeze, President Trump acts within his *inherent and exclusive* Article II, § 2 authorities as Commander-in-Chief during a time of war.

The president acts with an authority that the Supreme Court recognizes as "inherent in [the nation's] sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers -- a power to be exercised exclusively by the political branches of government." *Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972) (quotation marks omitted); *accord Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950).

In its 2016 *Mobarez v. Kerry* ruling, the District Court for the District of Columbia explained that it could not review just such a decision by Barack Obama which the president made in a diplomatic, foreign policy, and war context. When deciding to shutter the U.S. Embassy in Yemen, President Obama refused to facilitate the exit and safe travels of American citizens from the horrific conditions in Yemen back to American soil. The court refused to reach the plaintiffs' requested statutory interpretation and APA process analysis that supported their right to such travel assistance because such interpretation, inquiry, and analysis would have required the court to answer a political question:

> But the question that Plaintiffs' APA claim poses is not just what these provisions mean; it is also whether, if they mean what Plaintiffs say they mean, the Executive has violated the mandate that these provisions establish, and it is that aspect of the court's inquiry that would necessarily require the court to answer a non-justiciable political question. …

Mobarez v. Kerry, Civil Action No. 2015-0516 (D.D.C. 2016). The court would not second-guess the president's admittedly-strange decision not to honor the statute so as to help America's own citizen travel back to America. *Id.*

Amicus respectfully asserts that in the instant action the Court will find no judicially manageable standards by which it can endeavor to assess our newly-elected president's interpretation of classified and military intelligence and his resulting decision -- based on that intelligence -- to freeze entry of aliens from listed nations. The Fourth Circuit has specifically warned about just such information-rich national security and foreign policy litigation where a judge is:

> asked to make determinations of fact in an area where the judiciary lacks power to obtain information, and in which it has neither expertise to evaluate the information brought before it nor standards to guide its review….These difficulties lead us to conclude that this suit presents a nonjusticiable political question."

Smith v. Reagan, 844 F.2d 195 (4th Cir. 1988).

If the freeze is not implemented, this Court is not competent to foresee the national security and foreign policy consequences of such judicial interference in the war on terror. This Court is also not competent to assess the practical consequences such as nature and fiscal costs of alternative national security measures that may be required to try to keep track of those aliens allowed to enter from the listed nations.

Associate Justice Robert Jackson in *Chicago & Southern Airlines v. Waterman* long ago recognized that foreign policy decisions "are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil." 333 U.S. 103 111 (1948). Justice Jackson further emphasized that such "decisions are of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry." And, "It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit in camera in order to be taken into executive confidences." *Id.*

The travel freeze is implemented as a matter of the president's war-strategy, national-security, and foreign-policy calculus – and not as a matter of ordinary immigration procedure or immigration law enforcement. The president's calculus that led to the immediate travel freeze also includes longer-term policy objectives. The travel freeze has varied foreign policy objectives – deeply layered – with only some patent.

But obviously, the new president sends a strong war-related policy signal to all nations -- "friends and foe alike" -- regarding his "America first" foreign policy shift first formally announced in his Inaugural Address. The travel freeze cues our NATO allies to reconsider their own porous national borders. The European nations' irresponsible failure to maintain their own sovereign borders has led to deadly terrorist acts and generally violent public spaces. Alien terrorists and would-be terrorist thugs who have been welcomed into Europe by its naïve leaders now stand in European airports only a seven-hour direct flight away from the United States.

The freeze also directly confronts and disrupts expectations of wealthy monarchs and potentates of the Middle East. [1] Those oil-rich kingdoms have long expected, and still demand that, America to "pay any price, bear any burden" to deal with their own region's hellish disorder.

All nations of the world -- including our allies in Europe and our "frenemies" in the Middle East -- have been given explicit notice that at any point in future the travel freeze list may expand to include "the names of any additional countries recommended for similar treatment, as well as [to contract to remove] the names of any countries that … should be removed from the scope of a proclamation." Exec. Order No. 13780 (March 6, 2017). Indeed, Iraq was able to reform its vetting cooperation so as not to be included in the March 6, 2017 list.

Again, in its 2016 *Mobarez v. Kerry* ruling, the District Court for the District of Columbia recognized that it did not have jurisdiction to review President

[1] One might hope that the travel freeze is the beginning of a disruptive application of an "America first" version of "smart power" theories; a disruptive move appropriate to this unusual, prolonged war. (For a traditional articulation of smart power theory, *see* Joseph R. Nye: *Get Smart: Combining Hard and Soft Power* 88 FOREIGN AFFAIRS 160 (2009)).

Obama's inherent and exclusive authority in matters of war strategy, national security, and foreign policy. Notwithstanding the compelling claims of American citizens (many who were Muslim in faith practice) that a federal statute and APA processes required that the president ensure their travel security, the Court refused to review the case. The ruling acknowledged that the court did not have the institutional competence or critical information. *Mobarez v. Kerry*, Civil Action No. 2015-0516 (D.D.C. 2016).

Similarly, in the instant case, the president has determined that the dangerous, violent, and absurdly chaotic conditions exist in Yemen and other listed nations are such that the Executive Branch must freeze travel by aliens from those nations. *Amicus* respectfully asserts that just as the judiciary may not second-guess the president's refusal to provide for embassy evacuations of American citizens out of Yemen, neither should it second-guess the new president's refusal to allow embassy/consular processing of visa applications for aliens in Yemen and other of the listed nations.

In accessing that perpetually violent region of the world, this Court does not have better institutional competence, or better military strategy, or better classified information than does the Executive Branch. In *Mobarez*, the court used *Zivotofsky v. Clinton*, 132 S.Ct. 1421 (2012), to explain why political-question abstention, notwithstanding the American-citizen plaintiffs' reliance on a federal statute, executive order, and memorandum of understanding, was required:

> When deciding the claim merely requires the court to engage in garden-variety statutory analysis and constitutional reasoning, [the court] has authority to do so (i.e., the claim is justiciable), but a claim that goes beyond those classically judicial functions to request that a court override discretionary foreign-policy decisions that the political branches have made—however framed—falls within the heartland of the political-question doctrine. …

Id.

The *en banc* D.C. Circuit has offered fulsome explanation as to why the federal judiciary should not review such matters. *El-Shifa, 607 F.3d* 836, 842-43 (D.C. Cir. 2010) (*en banc*). The *en banc* D.C. Circuit was resolute: "Courts are not a forum for reconsidering the wisdom of discretionary decisions made by the political branches in the realm of foreign policy or national security." *Id.* at 840. And consider also the District Court for the District of Columbia's political question determination, made in 2016, in the context of Yemen nationals who asserted a directly-relevant federal tort claim statute to seek relief from injuries that resulted from American national security actions in the Yemen: "If plaintiffs' claims, 'regardless of how they are styled, call into question the prudence of the political branches in matters of foreign policy or national security,' then they must be dismissed." *Jaber v. United States*, No. 15-0840, 2016 WL 706183, at *4 (D.D.C. Feb. 22, 2016) (quoting *El-Shifa*, 607 F.3d at 841).

To appreciate the political thicket into which Plaintiffs-Appellees seeks to draw the judiciary, reference must be made to the passionately negative reaction of establishment and institutional elites to the candidacy of Donald John Trump. Now a broader group of elites in our political, media and legal establishments seek to undermine President Trump's nascent administration – particularly in relation to his war-policies and aliens. This is relevant because, in a shocking act of insubordination, President Trump's top-lawyer -- Acting Attorney General Sally Yates -- publically announced she was ordering Main Justice and her federal prosecutors across the nation (Defendants' present lawyers) to not enforce the president's orders. Yates had accepted the offer to serve as President Trump's Acting Attorney General while being well aware of the president's positions on military strategy and alien entry. Tellingly, Yates did not resign in respectful disagreement. Senate Judiciary Chairman Charles Grassley was among many to describe General Yates' action as nothing less than "sabotage." Only history will tell if and when those career government officials and Beltway elites, some perhaps tormented from what has been termed *Trump derangement syndrome*, come to eventually accept Donald Trump's election. Victor Williams, *Travel Ban*

Challenges Present a Non-Reviewable Political Question, JURIST - FORUM, Feb.15, 2017, http://jurist.org/forum/2017/02/Victor-Williams-travel-ban.php

Following *Harisiades v. Shaughnessy,* however, this Court must honor the choice of the States' electors and in "maintenance of a republican form of government" acknowledge that it is the elected-president, not the unelected judiciary, that has responsibilities to calculate war strategy and formulate foreign policy. 342 U.S. 580, 588-89 (1952). *See* U.S. Const. amend. XII, § 1.

Amicus respectfully argues that it is not possible for the judiciary to competently review the wisdom of the Executive Branch's calculus -- of war strategy, national security, and foreign policy – made in implementing the travel freeze. Conditions are such in these listed nations that there must be a fulsome assessment of the prior administration's vetting procedures by the new president: "[T]he risk of erroneously permitting entry of a national of one of these countries who intends to commit terrorist acts or otherwise harm the national security of the United States is unacceptably high." Exec. Order No. 13780 (March 6, 2016).

Although the Executive Branch should not have had to do so to avoid judicial interference in its war-strategy calculus, the president's Executive Order nevertheless references some of the hellish conditions existing in each of those listed nations – conditions which require the travel freeze. The high court has ruled:

> The Executive should not have to disclose its "real" reasons for deeming nationals of a particular country a special threat—or indeed for simply wishing to antagonize a particular foreign country by focusing on that country's nationals—and even it if did disclose them a court would be ill equipped to determine their authenticity and utterly unable to assess their adequacy.

Reno v. American-Arab Anti-Discrimination Committee, 525 U.S. 471,491 (1999).

In the instant case, Plaintiffs-Appellees may not clear the political question bar simply by recasting the president's calculus involved with a foreign policy and national security determination in terms of an ordinary matter of immigration law and/or APA immigration procedure. *See Aktepe v. United States*: 705 F.3d 1400 (11th Cir. 1997). Neither can Plaintiffs-Appellees jump the abstention barrier by specious assertions of due process and equal protection violations, *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990) (citing *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950), nor by assertions of religious discrimination. And neither can Plaintiffs-Appellees do so by slanderously questioning the motives of the president for implementing the freeze. Neither should the judiciary take an Alice-in-Wonderland trip through a presidential candidate's campaign statements. attempting to glean proof of such religious bigotry. Such involves both "lack of respect" and "embarrassment" warned against by *Baker v. Carr* – yet it is the judiciary that is ultimately embarrassed by such ideological wanderings and jurisprudential frivolity.

Congressman John Marshall, in 1800, warned his U.S. House colleagues that the political branches would be "swallowed-up by the judiciary" without such judicial self-restraint. Speech of the Honorable John Marshall (Mar. 7, 1800), 18 U.S. app. note I, at 16-17 (1820) (cited by *The Political Question Doctrine and the Supreme Court of the United States* (Nada Mourtada-Sabbah and Bruce E. Cain, eds.) 25 n. 10) 2007). On the very same day, Congressman Marshall explained the "sole organ" power of the president in foreign relations.

Three years later, U.S. Chief Justice John Marshall provided early guidance as to the "rule of law to guide the court in the exercise of its jurisdiction." Marshall offered this political question description: "By the constitution of the United States, the president is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience." *Marbury v. Madison,* 5 U.S. 137, 165 (1803).

More recently, however, Seventh Circuit Judge Richard Posner artfully explained that the doctrine acknowledges the Constitution's "assignment of exclusive decision making responsibility to the nonjudicial branches of the federal government." *Miami Nation of Indians v. Department of Interior*, 255 F.3d 342 (7th Cir. 2001). Instructive is Richard Posner's strong statement regarding the "nature of the questions that the court would have to answer — which asks whether the answers would be ones a federal court could give without ceasing to be a court." *Id* at 347.

In the context of the national litigation challenging the travel freeze, it is fair to consider that sister courts' zealous actions to force an answer to the patent political question might match Posner's description of a court "ceasing" to be a court. Having ceased to be a court, a judge's insistence on answering such a patent political question may be perceived by those outside the judiciary as, at best, "so-called judging," and at worst, intentional usurpation.

In *Zivotofsky v. Clinton I*, the Supreme Court was discretely tasked with determining a federal statute's constitutionality and the resulting ruling provides helpful contrast as to the contours of the abstention requirement. 132 S. Ct. 1421 (2012). Unlike the instant case, the high court did not need to determine whether there were judicially determinable and manageable standards for an interpretation, analysis, and application of the relevant statute. Its determination was discrete as to the statute's constitutionality. Indeed to make it clear that *Zivotofsky* was decided in a narrow context, Associate Justice Sonia Sotomayor, in concurrence, reiterated the importance of political-question abstention to the separation of powers. *Id* at 1431-6 (2012). And Associate Justice Steve Breyer wrote to warn how allowing judicial review in a broader foreign policy context can pose a "serious risk" of "embarrassment, show lack of respect for the other branches, and potentially disrupt sound foreign policy decision making." *Id* at 1437. Justice Breyer urged careful consideration of the abstention option in foreign policy matters involving the Middle East where ordinary administrative matters can have far reaching implications:

> Political reactions in that region can prove uncertain. And in that context it may well turn out that resolution of the constitutional argument will require a court to decide how far the statute, in practice, reaches beyond the purely administrative, determining not only whether but also the extent to which enforcement will interfere with the president's ability to make significant recognition-related foreign policy decisions.

Id. at 1429-30.

The instant case requires far more than a straightforward determination of a statute's constitutionality, as was the case in *Zivotofsky*. Rather, the Plaintiffs' claims require this Court to review and second-guess the Executive Branch's complicated foreign policy and national security calculus in prosecuting the war on terror. As discussed above, in *Mobarez*, the District of Columbia District of Columbia acknowledged *Zivotofsky's* assistance to cases such as the instant one. *Mobarez v. Kerry* Civil Action No. 2015-0516 (D.D.C. 2016). Other courts have recently made similar nonjusticiability determinations by contrasting the narrow context of the *Zivotosky* ruling. *See Ctr. for Biological Diversity v. Hagel*, 80 F. Supp. 991, 1011 (N.D. Cal. 2016) and *Alaska v. Kerry*, 972 F. Supp. 1111 (D. Alaska 2013).

The president has a most solemn duty to protect the Republic's citizens from potential harm. Vigilance against alien enemies who threaten to alight our shores, during a time of war, is the highest mandate of the president. But, as argued above, the travel freeze has obvious "smart power" foreign-policy objectives that are also critical to the new president's nascent administration.

Providing such Executive energy for national security was a fundamental reason for the 1787 Convention that led to replacement of the Articles of Confederation. Consider Alexander Hamilton's argument for ratification of our second Constitution in FEDERALIST 23 as to the political branches most fundamental duties: "These powers ought to exist without limitation, because it is impossible to foresee or to define the extent and variety of national exigencies, and the correspondent extent and variety of the means which may be necessary to satisfy them. The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed." Alexander Hamilton, "*No. 23: The Necessity of a Government as Energetic as the One Proposed to the Preservation of the Union,*" in Clinton Rossiter, ed., *The Federalist Papers* 148-153 (New York: Mentor, 1999).

From Marbury forward, the political question doctrine has developed to preclude judicial consideration in a variety of issues with foreign relations prominent. *See e.g.*, *Oetjen v. Central Leather Co*., 246 U.S. 297, 303 (1918). In the modern case of *Baker v. Carr*, 369 U.S. 186 (1962), the Supreme Court identified six independent characteristics "[p]rominent on the surface of any case held to involve a political question." *See Baker*, 369 U.S. at 217.

As the D.C. Circuit has written, only one *Baker* criteria need manifest for an abstention determination. *See Snider v. Kissinger*, 412 F.3d 190, 194 (D.C. Cir. 2005). Not one, not two, but all six *Baker* characteristics are patent for this Court's consideration of the Plaintiff-Appellee's claims. The first two take prominence.

But it will also be with little or no "respect" shown to coordinate political branches if the Court seriously considers Plaintiffs' specious assertion that the president's motivation for the freeze stems from religious bigotry. And review of this matter is opposite to an "adherence" to the president's political decision already made. The Court's engagement in such judicial interference also threatens political and practical chaos. And by reviewing the instant matter, this Court will only add to the "multifarious pronouncements" of courts across the nation regarding the travel freeze. Although both the president and the judiciary will suffer "embarrassment" from such judicial intervention, it is the American people who will suffer a greater danger of terrorist harm. And the American people's long asserted claims of self-governance are cast into doubt if their newly-elected president is not given room to do exactly what he promised to during 2016 election – better protect citizens during this time of war.

Judicial declarations interfering with President Trump's decision on the travel freeze will certainly create doubts among the international community as to the resolve of the United States to adhere to this position. *See Lowry v. Regan*, 676 F. Supp. 333, 340 (D.D.C. 1987). *See also, Smith v. Reagan*, 844 F.2d 195, 199 (4th Cir. 1988).

Subsequent to *Baker*, the Supreme Court in *Nixon v. United States*, 506 U.S. 224 (1993) applied these *Baker* factors by instructing that the political question analysis begins by "determin[ing] whether and to what extent the issue is textually committed." 506 U.S. at 228. The Supreme Court rejected, as nonjusticiable, a debenched federal judge's challenge to the Senate's exercise of its Article I, § 3, Clause 6 "sole" duty to "try" all impeachments. The Court refused to review a procedurally problematic Senate impeachment trial process in which an "evidence committee" of only 12 senators heard testimony while 88 senators avoided jury duty. The Court explicitly ruled "the word 'try' in the Impeachment Trial Clause does not provide an identifiable textual limit on the authority which is committed to the Senate" *Id.* at 239. Neither should this Court review the president's exercise of his exclusive textual authority to implement war strategy and security-related foreign policy.

Just as the Supreme Court did in the *Nixon*, this Court should readily determine that "there is no separate provision of the Constitution" 506 U.S. at 237, that could be rationally argued to conflict with the President's textual authority to utilize his war powers to implement the travel freeze. Foreign-soil aliens do have Fifth or First Amendment rights (and they cannot bootstrap such rights from their alleged contacts with American citizens and resident aliens). As Chief Justice William Rehnquist wrote: "Indeed, we have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990) (citing *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950). *See also, Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State, Bureau of Consular Affairs*, 104 F.3d 1349, 1354 (D.C. Cir. 1997) and *Azizi v. Thornburgh*, 908 F.2d 1130, 1134 (2d Cir. 1990).

It bears reemphasis that the travel freeze does not apply to aliens presently residing in America, unlike the alien residents at issue in *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886). And the instant action does not involve aliens having been involuntarily taken to, and/or subject to prolonged detention on, American soil or on foreign soil over which America has "plenary or exclusive jurisdiction." *Rasul v. Bush*, 542 U.S. 446 (2004). Quite the opposite in factual context, the complaints stem from foreign-soil aliens not being immediately allowed entry onto America's soil. The Guantanamo Bay cases are *not* supportive of the Court's subject matter jurisdiction in this matter. *See Boumediene v. Bush*, 53 US 723 (2008).

Goldwater v. Carter is example of the Supreme Court's most efficient political question determination. 444 U.S. 996 (1979). The Supreme Court rejected senators' attempt to interfere with an exclusive Executive authority to conduct foreign policy by abrogating a treaty previously Senate ratified. Without oral argument, the high court announced: "The petition for a writ of certiorari is granted. The judgment of the Court of Appeals is vacated and the case is remanded to the District Court with directions to dismiss the complaint." *Id.*

But perhaps less "domesticated" abstention advocacy is needed to counsel this Court's self-restraint in this important and highly public matter; "something greatly more flexible, something of prudence, not construction and not principle." The purest prudential strain of nonjusticiability still incubates in Alexander Bickel's THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS. Professor Bickel described political questions as those issues which ask the courts to evaluate policy and choose between outcomes – functions which the judiciary as an institution is functionally incompetent to carry out.

In unmatched written aesthetic, Alexander Bickel offered a foundation instead of *Baker*-like criteria:

> In a mature democracy, choices such as this must be made by the executive…Such is the foundation, in both intellect and instinct, of the political-question doctrine: the Court's sense of lack of capacity, compounded in unequal parts of (a) the strangeness of the issue and its intractability to principled resolution; (b) the sheer momentousness of it, which tends to unbalance judicial judgment; (c) the anxiety, not so much that the judicial judgment will be ignored, as that perhaps it should but will not be; (d) finally ("in a mature democracy"), the inner vulnerability, the self-doubt of an institution which is electorally irresponsible and has no earth to draw strength from.

Alexander Bickel, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 184 (Yale 1986).

When considering the danger that could result from judicial interference in the president's foreign policy and war strategy, it is disturbingly prescient that Professor Bickel addressed "the anxiety, not so much that the judicial judgment will be ignored but that it should but will not be." And certainly today, our unelected judiciary, which has "no earth to draw strength from," would be wise to stay out of the worsening and ugly mud-fight being waged by ideological elites against Donald Trump.

Admittedly, the late Yale University law professor's prudential poetry unnerves the judge-centric consciousness so predominant at bar and in the legal academy. All the more reason for this Court's deep consideration of its truth.

Just as this argument began, it should finish by again acknowledging that one can hardly bear to read many of the tragic narratives of aliens' hurt, fear, and family separation as relayed in the travel freeze litigation across America. Sadly, General Sherman remains right – "war is hell."

During this time as our new president re-orients both war prosecution and foreign policy, while the hellish states of civil war, violent disorder, and evil oppression only worsen in the listed nations, our federal judiciary has its own high duty to perform -- abstention.

Dated: March 30, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on March 30, 2017, the brief with relevant motion was filed with the Clerk of this Court using the commercial carrier (as *pro se* prospective *Amicus* is not a registered ECF user) and served on parties using electronic transmittal via their email addresses registered to their ECF accounts also offering to provide print copies.

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